United Nations CAT/C/59/D/606/2014

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 606/2014*, **

Communication submitted by:	Ennaâma Asfari (represented by ACAT-France and Joseph Breham)
Alleged victim:	The complainant
State party:	Morocco
Date of complaint:	4 March 2014 (initial submission)
Date of the present decision:	15 November 2016
Subject matter:	Torture in detention
Procedural issues:	Exhaustion of domestic remedies, abuse of the right to submit a complaint
Substantive issues:	Torture or cruel, inhuman or degrading treatment; obligation of the State party to proceed to an impartial investigation; prohibition on invoking statements obtained through torture as evidence; protection against all forms of intimidation for reporting acts of torture
Articles of the Convention:	1, 12 to 16

1.1 The author of the communication is Ennaâma Asfari, who was born in 1970 in Western Sahara, where he lives when he is not in France. He claims that Morocco has violated articles 1 and 12 to 16 of the Convention.[1] He is represented by Action by Christians for the Abolition of Torture-France (ACAT-France) and his lawyer, Mr. Joseph Breham.[2]

1.2 On 27 January 2015, at the request of the State party, the Committee, acting through its Rapporteur on new communications and interim measures, decided to examine the

* Adopted by the Committee at its fifty-ninth session (7 November–7 December 2016).

** The following members of the Committee participated in the examination of the communication: Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Race, Sébastien Touzé and Kening Zhang. Pursuant to rule 109 of the Committee's rules of procedure, Committee member Essadia Belmir did not participate in the adoption of the present decision.

[1] Morocco declared that it recognizes the competence of the Committee against Torture to receive and consider individual communications under article 22 of the Convention on 19 October 2006.

[2] The power of attorney under which ACAT-France and Mr. Breham represent the complainant before the Committee was drawn up by his wife. Given that the complainant is currently being held in Salé 2 prison in Morocco, he is reportedly unable to sign the power of attorney himself.

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admissibility of the communication separately from the merits. On 20 April 2015, the Committee declared the complaint admissible.

The facts as submitted by the complainant

2.1 The complainant describes himself as a human rights defender and a peaceful activist for the independence of Western Sahara. He has been married to a French citizen since 2003. He claims that he has been subjected to police and judicial harassment by the Moroccan authorities because of his activities reporting human rights violations in Moroccan-administered Western Sahara. He claims to have been arrested, ill-treated and convicted on several occasions in 2006, 2008, 2009 and early 2010.

2.2 After 9 October 2010, thousands of Saharans living in Western Sahara left their homes to move to temporary camps located on the outskirts of towns, including the Gdeim Izik camp near Laâyoune. The aim of this action was to denounce the economic and social discrimination to which Saharans consider themselves to be subjected by the State party. The complainant was responsible for showing foreign visitors and journalists around the Gdeim Izik camp and explaining to them the issues at stake.

2.3 On 7 November 2010, the complainant was approached on two occasions by government envoys wearing civilian clothes who asked him to have the camp evacuated. The complainant replied that it was not within his power to do so. That evening, the complainant noticed police officers near to the house where he was staying. He expressed his concern to his wife, who had remained in France. The same evening, while the complainant was paying a visit to a family who were friends of his, Moroccan security forces burst into the house and struck several members of the family. They then proceeded to violently arrest the complainant; although he offered no resistance, he was violently pushed to the ground, handcuffed, blindfolded and beaten unconscious. According to the complainant, plain-clothes agents of the Directorate-General for National Surveillance and the General Intelligence Department were present. During a journey lasting 30 minutes, he was forced to remain with his head between his legs and was punched and hit with a walkie-talkie on his back and head. He was taken to Laâyoune police station, where he was held from 8 p.m. until 5 a.m.

2.4 During the hours he was held at Laâyoune police station, the complainant was forced to remain still while handcuffed and blindfolded. He was struck whenever he moved or changed position. He was insulted and accused of being a traitor and a mercenary. The complainant was then questioned by senior police officials about his involvement in the Gdeim Izik camp, of which he was alleged to be the organizer. During the interrogation, he was slapped, punched in the face, beaten on the soles of his feet with a stick (*falaqa*) and then struck with the stick on the buttocks. After about forty minutes, his trousers and T-shirt were removed and he was forced to remain in a kneeling position; otherwise he would be beaten. At dawn on 8 November 2010, the complainant, still handcuffed and blindfolded, was transferred to Laâyoune gendarmerie.

2.5 The complainant was held at Laâyoune gendarmerie until 12 November 2010, without knowing where he was. During all that time, he was kept blindfolded with his wrists handcuffed behind his back and seated on a mattress without being able to move. He was only allowed to lie down after the last call to prayer of the day. He had almost nothing to eat and was able to drink only twice a day. He could only go to the toilet when accompanied by two officers and, even then, he remained handcuffed. He was questioned daily about his relationship with the Polisario Front, his contacts within that movement, political parties in Morocco, his childhood, the Gdeim Izik camp and his activities in France.

2.6 On the night of 11 to 12 November 2010, the complainant, who was still blindfolded, was transferred, along with other prisoners, to the Laâyoune Court of Appeal to appear before the investigating judge. While he was waiting in the corridors of the Court, a gendarmerie officer hit him and threatened him in order to force him to sign a notebook,

without letting him see what it contained.[3] He was subsequently taken back to the gendarmerie without even seeing the judge.

2.7 On the evening of 12 November 2010, the complainant was taken to Laâyoune airport along with several other prisoners and was then transferred to Rabat by military airplane. During the flight, he was forced to lie face down at knifepoint and to wear plastic handcuffs that cut into his wrists. Upon arrival in Rabat, he was taken to the military court to be heard by a judge who did not allow him to speak, even though there were signs of beating and blood on his face. From 12 November 2010 onwards, the complainant was held in remand detention in Salé 2 prison, where he spent the first night handcuffed to a large door with iron bars, at first standing and then lying on the ground. He was kept blindfolded throughout and was hit whenever he moved. On 18 November 2010, he was placed in solitary confinement for four months and was denied out-of-cell exercise. The complainant began a hunger strike, and he then had his first medical examination since his arrest. On 9 December 2010, the complainant saw one of his lawyers for the first time and received a visit from his wife, who had been informed of his arrest by the relatives of other Saharan detainees. In April 2011, the complainant received authorization to have reading material but was not given authorization to send or receive correspondence.

2.8 At the two hearings on 12 January and 12 August 2011, the complainant told the judge that he had been tortured. The complainant consistently denied the acts with which he had been charged in relation to the violence that occurred during the dismantling of the Gdeim Izik camp; he explained that he had been forced to sign a document whose contents were unknown to him. In his ruling of 22 December 2011, the military investigating judge declared the investigation completed and sent the case to the military court for trial. On 16 February 2013, the complainant was sentenced by the Permanent Military Court of the Royal Armed Forces in Rabat to 30 years' imprisonment for forming a criminal gang and for participating in the violence that led to the premeditated killing of law enforcement officials, who died while performing their duties in connection with the dismantling of the Gdeim Izik camp. Twenty-four other Saharans were also prosecuted for the same offences and sentenced at the end of the trial, which the complainant denounced as generally unfair and marred by blatant irregularities, including falsification of documents, for example, by changing the date of his arrest. The authorities stated that the complainant had been arrested on 8 November — after the Gdeim Izik camp had been dismantled — whereas, in fact, he had been arrested the day before those events occurred, so could not have taken part in them. There was no right of appeal against the ruling.

The complaint

3.1 The complainant alleges a violation by the State party of articles 1 and 12 to 16 of the Convention.

3.2 The complainant maintains that the physical ill-treatment he suffered between 7 and 12 November, at the time of his arrest, during his interrogation at the police station and later at Laâyoune gendarmerie, and the treatment he received during his transfer by plane constitute acts of torture because of the severity of the violence inflicted upon him. He refers in particular to the violent treatment to which he was subjected during the night of 7 to 8 November 2010, with a view to obtaining information about his involvement in the Gdeim Izik camp and his relationship with the Polisario Front movement. He maintains that those acts of violence caused him acute suffering for months on end, in particular as a result of a lack of medical care, and that they constitute a violation of article 1 of the Convention.

3.3 The complainant claims to have been tortured during his hearings before the military investigating judge and then the military court. He notes that no investigation into this allegation has ever been opened. Moreover, at the hearing of 12 November 2010, the investigating judge took no action even though the complainant, who was appearing without his lawyer, had signs of beating and blood on his face and showed the judge the bruises on the soles of his feet. The judge failed to record these facts in the minutes of the

[3] The complainant assumes that these were confessions subsequently presented to the judge as having been signed by the complainant during his interrogation.

hearing. Moreover, the complainant denounced the acts of torture to which he had been subjected at the hearings before the military investigating judge on 12 January and 12 August 2011, and repeated his complaint during his trial before the military court. He states that no medical examination was ordered by the military investigating judge, a fact which was also denounced by his lawyer during the trial. By proceeding in this manner, the judicial authorities denied the complainant his right to justice, compensation, medical treatment including psychological care, and guarantees of non-repetition of the crime. The complainant considers that these facts constitute violations of articles 12, 13 and 14 of the Convention.

3.4 The complainant also considers that his conviction by the military court is based on his so-called confession, which he denies having made, and on the confessions of his co-defendants, which were obtained by means of torture. He recalls that he confessed to nothing, but was forced to sign a document without being able to ascertain its contents. The complainant considers that the State party violated article 15 of the Convention because it did not ensure that any statement obtained as a result of torture could not be invoked as evidence in the proceedings against him.

3.5 More generally, he denounces all the ill-treatment that was inflicted upon him throughout the judicial process which, even if it does not constitute torture, amounts to inhuman and degrading treatment under article 16 of the Convention nonetheless. He includes in this regard the conditions of his detention during the first months that he spent in Salé prison in Rabat. In particular, he denounces his continued arbitrary detention on the basis of confessions obtained through torture. The complainant alleges that, when he was placed in pretrial detention on 12 November 2010, he spent the first night handcuffed to a large door with iron bars, at first standing and then lying on the ground. He was blindfolded, and was kicked and verbally abused by the guards whenever he moved. From 18 November 2010, he was placed in solitary confinement. He was held in a cell for three months, was denied out-of-cell exercise and could communicate with other detainees only through the window. He was allowed a medical examination only after his hunger strike, and had to wait until 9 December 2010 to be allowed his first visit from one of his lawyers. He was permitted to see his wife only after completing a month in detention. During her first four visits, he was not allowed to see her alone, and he was therefore unable to tell her about the treatment he had suffered.

3.6 The complainant claims to have exhausted all domestic remedies. He reported the acts of torture to which he was subjected to the judicial authorities on several occasions in the presence of witnesses, and his complaints were detailed in the records. However, no investigation was opened into the allegations. The Moroccan authorities' refusal to investigate the complainant's allegations of torture was never notified officially; the judicial authorities simply decided to take no action. Furthermore, such a refusal cannot be appealed. At the hearing on 8 February 2013, the complainant's lawyer asked the military investigating judge for permission to question the persons who had drafted the record of the interrogations about the conditions in which the confession had been obtained. His request was rejected. In its interim order of 8 February 2013, the military court took note of the allegations of torture but failed to act upon them. Impunity for acts of torture was denounced by the Committee in its concluding observations on Morocco (see CAT/C/MAR/CO/4, para. 16).[4]

3.7 The military justice system does not provide for two-tier proceedings; accordingly, the ruling of the military court cannot be appealed. The complainant lodged an appeal in cassation in February 2013 but, more than a year later, he had still not received any reply. Even if the appeal were granted, the judge would not re-examine the case on the merits since, pursuant to articles 568 and 586 of the Moroccan Code of Criminal Procedure, the Court of Cassation may only rule on points of law and not on matters of fact. In the complainant's case, the powers of the Court of Cassation are all the more limited because torture does not feature among the matters submitted for consideration to the military court by the prosecutor, who has sole discretion to prosecute. Therefore, the judges could not take

[4] The complainant also refers to the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (see A/HRC/22/53/Add.2, paras. 28 and 29).

up the issue of torture on their own initiative. However, the complainant maintains that, while they could not rule on the allegations of torture, the military judges should have reported the facts to the prosecutor so that he or she could launch an investigation.

3.8 The Court of Cassation cannot therefore review a final decision of the trial courts and is not competent to determine whether the complainant's confession was obtained as a result of torture or to order an investigation into allegations of torture.

State party's observations on admissibility

4.1 On 4 August 2014, the State party contested the admissibility of the complaint on the grounds of non-exhaustion of domestic remedies and abuse of the right to file a complaint.

4.2 The State party first states that the complainant was arrested on 8 November 2010 during the dismantling of the Gdeim Izik camp, which had been set up a few weeks previously by persons, including the complainant, who were affiliated to Saharan separatist groups in the vicinity of Laâyoune. The State party alleges that a campaign to encourage the local population to leave their homes and to occupy the camp was launched to bring pressure to bear on the authorities, with a view to securing social benefits for those persons.

4.3 The State party states that the complainant set up a militia, armed with knives, that was tasked with preventing the occupants from leaving the camp. When law enforcement officers who had been sent to dismantle the camp and restore public order approached, the complainant orchestrated and oversaw attacks against them that involved the use of knives, petrol bombs and ignited gas bottles. Eleven members of the security forces died as a result of the clashes; their deaths resulted in the prosecution and conviction of those who had instigated and carried out the attacks.

4.4 The State party explains that the security forces acted in accordance with the specific instructions of the public prosecutor's office and that all the usual warning procedures were scrupulously respected. The complainant was arrested with 69 other persons on 8 November 2010 during the dismantling operation and was taken to the premises of the judicial brigade of the Royal Gendarmerie of Laâyoune, where he was remanded in custody in accordance with the law and placed under the effective supervision of the Crown Prosecutor General of the Laâyoune Court of Appeal. He was brought before the military investigating judge on 12 November 2010.

4.5 The complainant was formally charged with the crimes committed during the dismantling of the camp and sentenced by the Permanent Military Court of the Royal Armed Forces on 17 February 2013.

4.6 The State party notes that almost four years passed between the occurrence of the alleged acts and the submission of the communication to the Committee in March 2014 — a delay that it considers excessive. The State party further considers that the communication contains several inconsistencies.

4.7 As to the exhaustion of domestic remedies, the State party notes that, following his conviction by the military court, the complainant entered an appeal in cassation. To date, the Court of Cassation has not ruled on the case. Moreover, the complainant has never filed a formal complaint about the torture and/or ill-treatment to which he was allegedly subjected, whether in police custody or thereafter, with any judicial authority or with any national authority. Indeed, he made no mention of the fact that he had allegedly been subjected to torture and/or ill-treatment at either the preliminary hearing on 12 November 2010 or the detailed hearing on 12 January 2011, even when assisted by a lawyer.

4.8 Furthermore, during the trial in February 2013, which was open to national and international observers, the defence team, which was representing all the defendants, mentioned the fact that four of them had allegedly been tortured and/or ill-treated without making any specific reference to the complainant. The judge was asked to order a medical examination of the four defendants in question. The complainant merely asserts that the authorities never agreed to undertake an investigation, even though he had taken no action whatsoever for that to happen. Moreover, the complainant has not demonstrated that domestic procedures were excessively long or ineffective. In accordance with the

Committee's jurisprudence, mere doubts as to the effectiveness of such procedures do not absolve the complainant from exhausting them.[5]

4.9 The State party considers the communication to be part of a political agenda parallel to the vote on the Security Council resolution on the mandate of the United Nations Mission for the Referendum in Western Sahara. It claims that the complainant's allegations are vague, non-specific and unfounded and that the documents appended to the communication refer mainly to a general situation, thereby revealing the purely political motivation of the complaint.

4.10 Lastly, the State party invokes an abuse of the right to file a complaint on the part of the complainant, in that he did not wait for the ruling of the Court of Cassation before referring the matter to the Committee and to the French criminal courts under the principle of universal jurisdiction.

Complainant's comments on the State party's observations

5.1 On 20 September 2014, in his response to the State party's observations, the complainant recalled that the complaint concerned the circumstances of his arrest and detention and compliance with the Convention by Morocco, not the reasons for his conviction; the latter issues do not fall within the Committee's remit.

5.2 The complainant maintains that he was arrested violently and without a warrant on 7 November 2010 at the home of friends. He considers that the procedural documents sent to the Committee which give 8 November as the date of arrest are proof that the date was falsified by the Moroccan authorities. He emphasizes that the complaint does not concern the actions of the security forces during the dismantling of the Gdeim Izik camp, since he had been arrested the day before and was therefore not present at the scene. The complainant challenges the State party's assertion that he was taken to Laâyoune Royal Gendarmerie just after his arrest and notes that the State party does not call into question the fact that he suffered acts of torture.

5.3 The complainant rejects the claim that he has failed to exhaust domestic remedies, because the Court of Cassation, to which he appealed last and whose decision he awaits, does not constitute a third level of jurisdiction and does not review the merits of a case. Pursuant to articles 568 and 586 of the Code of Criminal Procedure, the Court will rule on whether the military court complied with the law but not on the allegations of torture, which were not examined by the military court.

5.4 Under Moroccan law, prosecutions are the sole preserve of the public prosecutor's office. The judges could not therefore take up the issue of torture on their own initiative: the Court should have reported the facts to the prosecutor so that the latter could launch an investigation; however, by refusing to follow up on the victim's allegations and taking the view that the complainant had not been subjected to torture or to inhuman or degrading treatment, it clearly decided against such action.[6]

5.5 The complainant adds that the consideration of cassation appeals is not time bound, and that the Court could well take 10 years to hand down its decision. He considers that the ineffectiveness of domestic remedies in his case is clear and has been recognized in reports of Human Rights Watch and the Working Group on Arbitrary Detention.[7]

5.6 The complainant also challenges the State party's claim that he failed to file a complaint, since he reported the torture he had suffered to the judicial authorities several times. The complainant acknowledges that he did not request a medical examination.[8]

[5] The State party does not refer to any specific jurisprudence.

[6] The complainant refers to the military court's order of 8 February and its decision of 17 February 2013.

[7] Report of the Working Group on Arbitrary Detention on its mission to Morocco (A/HRC/27/48/Add.5); and Human Rights Watch, Country Chapter, January 2014 (reports annexed to the complaint).

[8] The minutes of the hearing of 8 February 2013 and the interim order of the Rabat military court mention the complainant's claim that he was tortured. The allegations of torture at the police station

However, he recalls that, when he was first brought before the military investigating judge on 12 November 2010, he had contusions on his face and a bloodied right eyebrow. He also showed the judge the bruised soles of his feet but the latter did not record these signs of abuse in the minutes. On 12 January 2011, this time in the presence of his lawyer, the complainant informed the judge of the torture that he had suffered. During the trial, he explicitly denounced the torture, as is evidenced in the minutes of the hearing of 8 February 2013 and the military court's interim order of the same date. The military court made no mention of these allegations in its decision of 17 February 2013; it found the defendants, including the complainant, guilty and sentenced them to prison.[9]

5.7 The complainant adds that, according to the Committee's jurisprudence on article 13, it is enough for the victim to bring the facts to the attention of an authority of the State for the latter to be obliged to initiate a prompt and impartial investigation.[10]

5.8 The complainant asserts that the State party's contentions that his complaint is politically motivated and that he abused the right to file a complaint are accusations repeatedly levelled at human rights defenders and prove that the State party does not intend to conduct an effective, prompt, independent and impartial investigation. In response to the State party's claim that the complaint is unfounded, the complainant recalls that the Working Group on Arbitrary Detention deemed his case to be serious and substantiated, and considered it in its 2013 report on its mission to Morocco (see A/HRC/27/48/Add.5, para. 68), in which it recommended that the State party should conduct prompt investigations into all allegations of ill-treatment in the context of arrests made during and after demonstrations and at Laâyoune prison, prevent arbitrary detention, prosecute the perpetrators and provide compensation to the victims.

5.9 The complainant requests the Committee to require the State party to provide redress by releasing him from prison and putting an immediate end to all forms of violation of article 15. He claims the right to be retried, with the information obtained under duress excluded, and requests compensation for physical, psychological and moral injury, for material damage and loss of earnings, and for loss of earnings potential. He also requests the payment of compensation for costs incurred in judicial proceedings, expert assistance and medical, psychological and social services, as well as access to free, appropriate and prompt rehabilitation. Lastly, he requests measures of satisfaction, namely a prompt, independent, effective and impartial investigation into the allegations of torture and guarantees of non-repetition.

Additional information provided by the complainant

6.1 On 4 February 2015, the complainant and his counsel informed the Committee that they were both being intimidated by the Moroccan authorities. They stated that, in March 2014, shortly after the complaint was submitted to the Committee, the Moroccan and French media had announced that the Moroccan Ministry of Justice had decided to file a complaint for defamation and false accusation, among other issues, against the complainant, his counsel and two other victims tortured in Morocco. In June 2014, the media announced that a complaint had been filed against the complainant and his counsel by the Ministry of the Interior of Morocco.[11] The complainant, his counsel and the other accused persons received no news about the proceedings until, at the end of January 2015, counsel and one of the victims represented by ACAT-France were summoned to appear before an investigating judge of the Rabat Court to answer charges of defamation, false accusation, insulting the authorities, using manipulation and fraud to induce others to give false testimony, complicity and public abuse.

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also appear in the decision of the first investigating chamber, which referred the case to the Rabat military court.

[9] See military court decision of 17 February 2013.

[10] See, for example, communications No. 6/1990, *Parot v. Spain*, Views adopted on 2 May 1995, para. 10.4; No. 59/1996, *Blanco Abad v. Spain*, Views adopted on 14 May 1998, para. 8.6; and No. 189/2001, *Bouabdallah Ltaief v. Tunisia*, decision adopted on 14 November 2003, para. 10.6.

[11] See www.afrik.com/affaire-hammouchi-le-maroc-depose-plainte-et-fustige-la-justice-francaise (11 June 2014).

6.2 These offences are punishable by custodial sentences and the defendants could also be ordered to pay a fine and damages. Counsel considers that this complaint violates the Convention, in particular article 13 thereof.

6.3 Counsel is concerned that the Moroccan authorities will carry out their threats to impose a conviction, following the complaint filed by the Ministry of the Interior of Morocco, as they did in the case of another person, W.C., who is a member of the February 20 Movement and the Moroccan Human Rights Association. On 20 October 2014, W.C. was sentenced to 2 years' imprisonment for false accusation as a result of filing a complaint of torture and abduction with the public prosecutor in Tangier on 30 April 2014. Three days previously, at the end of a demonstration in which she had participated, the young woman had been abducted, then beaten, insulted and threatened before being abandoned outside the city. On 23 July 2014, another activist of the Moroccan Human Rights Association was sentenced to 3 years' imprisonment and ordered to pay a fine, also for false accusation, after reporting acts of torture.

6.4 The complainant considers that the convictions of these human rights activists and the prosecution of himself, his counsel and the other two persons mentioned above are the first stages of a general policy of intimidation of victims of torture that was announced by the Minister of Justice in an official statement issued on 10 June 2014, in which the Minister promised to investigate the allegations of torture but also announced that persons making "false" accusations would be prosecuted. To date, in practice, only the second part of the announcement has been followed by specific actions.

6.5 In these circumstances, the complainant requests the Committee to find a violation of article 13 of the Convention and to make a ruling on his case as soon as possible. He also asks the Committee to urge the State party to put an immediate end to the intimidation.

6.6 On 18 February 2015, counsel requested the Committee to organize an oral hearing of the parties, as had been done on 8 May 2012 at the request of Kazakhstan in the case of *Abdussamatov et al. v. Kazakhstan*.[12]

6.7 The complainant is of the view that, as demonstrated by the observations submitted by Morocco, which accuse him and his counsel of using the Committee's complaints mechanism for political ends, the trial proceedings brought against him and his 23 co-defendants are highly politicized. He asks that the focus of the discussion be shifted towards a strictly legal approach to the situation.

6.8 The complainant also indicates that, since the complaint was submitted to the Committee, several articles have appeared in the Moroccan press which delegitimize the steps taken by himself and his counsel. The articles often portray him as a threat to the State, an Algerian agent or a murderer who is trying to evade responsibility.

6.9 On 6 March 2015, counsel added that a Moroccan lawyer from ACAT-France had gone to the Rabat Regional Court and had tried to obtain a copy of the complaint filed by the Ministry of the Interior. The judge refused to give him the copy requested, but confirmed that the complaint concerned the complainant, among others.

Additional information provided by the State party

7.1 On 12 March 2015, the State party replied that, in its view, it was inappropriate for the Committee to express a view on the alleged violation of article 13 of the Convention, as it had decided to consider only the admissibility of the communication at this stage. The State party wishes to reassure the Committee that the case against the complainant and his counsel should not be interpreted as a retaliatory measure. It denounces a series of criminal acts attributable to the non-governmental organization, ACAT-France, during a "slanderous" campaign and maintains that it is for this reason that the Moroccan authorities felt the need to file a complaint for defamation, false accusation and insulting the authorities. The State party asserts that this does not affect the complainant's ability to submit his complaint to the Committee.

[12] Communication No. 444/2010, *Abdussamatov et al. v. Kazakhstan*, decision adopted on 1 June 2012, para. 9.1.

7.2 Concerning the request for a hearing of the parties, the State party expresses surprise at such a request, which, in principle, can be made only by the State party and not by counsel, as occurred in the case to which the complainant refers. It adds that such hearings are not provided for in the Committee's rules of procedure concerning complaints under article 22 of the Convention.

7.3 On 16 April 2015, in response to counsel's letter of 6 March 2015, the State party noted that access to the criminal case file was organized in two stages. The first stage is a preliminary phase during which it is not possible to consult the criminal case file.[13] The second consists of a detailed hearing during which the criminal case file can be consulted[14] and the parties can be heard in the presence of their lawyers. In the present case, the judge refused to provide a copy of the criminal case file to the Moroccan lawyer from ACAT-France because he had asked to consult it at too early a stage in the proceedings. The State party adds that, since then, the lawyer has been informed of the decision, which he appealed on 16 March 2015.

7.4 The State party reiterates that the complainant has not exhausted domestic remedies because he has not filed a complaint of torture with the domestic courts.

Committee's decision on admissibility

8.1 On 20 April 2015, at its fifty-fourth session, the Committee considered the admissibility of the complaint and decided that it was admissible insofar as it raised issues under articles 1 and 12 to 16 of the Convention. The Committee concluded that the State party had failed to demonstrate that existing remedies for reporting acts of torture had, in practice, been made available to the complainant in order to enable him to exercise his rights under the Convention.

8.2 The Committee concluded that the one-year time period that had elapsed between the military court's decision and the complaint's submission to the Committee could not be regarded as constituting an abuse of the right to submit a complaint.[15]

State party's observations on the merits

9.1 On 18 September 2015, the State party reiterated its objection to the admissibility of the complaint on the grounds that no final decision had been handed down against the complainant: the Court of Cassation had not yet ruled on the case, and could decide to return the case to the competent trial court. If the case was returned, all substantive and procedural issues as well as points of law could be raised. The State party therefore requested the Committee to reconsider its decision on the admissibility of the complaint.

9.2 On 24 September 2015, the State party reiterated its request for the Committee to revoke its decision on admissibility. The complainant was arrested in flagrante delicto during the dismantling of the camp on 8 November 2010 by the Royal Gendarmerie, and not by the police, on the basis of substantial and consistent evidence establishing his involvement in the criminal offences committed during those events. By claiming that he was arrested by the police on 7 November 2010, and that he was subsequently tortured, the complainant is merely seeking to exonerate himself from responsibility for the very serious events for which he was arrested on 8 November 2010. No request for an investigation into the torture to which he was allegedly subjected has been submitted to the judicial authorities or to any other national mechanism for the protection of human rights. Moreover, the suspects never claimed to have been subjected to abuse, torture or ill-treatment at any stage of the proceedings before the competent judicial authorities. Furthermore, neither the Crown Prosecutor, nor the investigating judge at Laâyoune Court of Appeal, nor the military prosecutor nor the military investigating judge found any evidence of brutality that might have led them to open an ex officio investigation.

[13] See Code of Criminal Procedure, art. 134.

[14] See Code of Criminal Procedure, art. 139.

[15] The Committee recalled that neither the Convention nor the Committee's rules of procedure established a time limit for submitting a complaint.

9.3 The State party adds that large sums of money were found in the complainant's tent at the time of his arrest. It disputes the complainant's claim that he was arrested on 7 November at the home of one of his friends, Mehdi Toubali. The State party adds that during the hearing of 8 February 2013, the defence formally requested that the judge order a medical examination for four of the defendants, but not for the complainant, who merely asserts that the authorities never agreed to undertake an investigation into the acts of torture that he allegedly suffered. The authorities reiterate that the complainant is motivated by purely political considerations and that his allegations of arbitrary arrest and torture are not supported by tangible evidence and have no other purpose than to enable the complainant to escape the prison term to which he has been sentenced. The State party therefore considers that the complainant's allegations of violations of articles 1 and 12 to 16 of the Convention are unfounded.

9.4 On 4 December 2015, the State party submitted additional observations in which it maintained that the communication was inadmissible because the Committee had not been in a position to verify that all domestic remedies had been exhausted. In the absence of a complaint from the complainant on the torture allegations, in its decision of 21 May 2015 the Committee circumvented this requirement by focusing on the availability of effective avenues of redress for the complainant.

9.5 The State party draws attention to the nature and implications of the cassation appeal under way, and indicates that a new Code of Military Justice entered into force on 1 June 2015. The new Code gives the Court of Cassation the possibility of referring a case to a civil court (the Court of Appeal) should it decide to overturn the military court's judgment. In that event, the Court would also be required to rule on the merits of the case. One of the issues raised by the defence team during the cassation appeal specifically relates to the allegations of torture. As the complainant appealed to the Court of Cassation, which constitutes an effective remedy, his complaint is not admissible.

9.6 On 20 February 2014, the complainant filed a criminal complaint in France, initiating criminal indemnification proceedings for torture before the chief investigating judge at the High Court of Paris. The State party adds that the Committee cannot legitimately pass judgment on the availability of domestic remedies when the complainant has instituted proceedings for torture in a country other than the State party. On this basis, the argument that the State party is obliged to open an investigation simply in response to the complainant's allegations, without a formal complaint being filed, must be expressly rejected. Had the complainant filed his complaint with the Moroccan judicial authorities, as some of his co-defendants have done, the journalists present at his trial would not have failed to inform the public. His allegations of inaction on the part of the State party's authorities are therefore unfounded.

9.7 Having regard to the entry into force of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters between France and Morocco signed on 6 February 2015, the State party points out that the complaint filed by the complainant in Paris should be referred to the competent Moroccan judicial authority for a decision on how to proceed. A Moroccan court would thus be required to investigate the allegations of torture. The State party therefore reiterates that all domestic remedies have not been exhausted.

Complainant's comments on the merits

10.1 On 12 November 2015, the complainant submitted his comments on the State party's observations. He himself and his family are still suffering the legacy of torture. With regard to the challenge to the Committee's decision to find the complaint admissible, he recalls that, according to the Committee, the State party failed to provide sufficient evidence to prove the non-exhaustion of domestic remedies. With regard to the appeal proceedings, he notes that, in his case, the Court of Cassation was not informed of the allegations of torture which the investigating judge chose not to refer to the military court for consideration. The complainant recalls that he was prosecuted for and convicted of murder. He adds that, along with his co-defendants, he ceaselessly denounced the acts of torture and inhuman and degrading treatment suffered and challenged the veracity of the confessions obtained as a result of torture both before the investigating judge and during the

hearing before the military court. As none of the Moroccan judges wished to consider his allegations, the Court of Cassation is not competent to rule on the merits of the allegations of torture that he has submitted.

10.2 The complainant recalls that the cassation appeal has been in progress since February 2015. Thus, not only is it irrelevant as far as the allegations of torture are concerned, but it is also taking an unreasonable length of time. With regard to the proceedings instituted against the victim and his legal representative, the complainant finds it regrettable that the State party is vaunting the judicial harassment to which it is subjecting the victim and the non-governmental organization assisting him as grounds to declare the complaint submitted to the Committee inadmissible. He also notes that the case for false accusation and other offences instituted against him and ACAT appears to have stalled, as it has never been heard by the investigating judge. He adds that since 2010 legal proceedings have been initiated against the vast majority of the Saharans arrested in connection with the dismantling of the Gdeim Izik camp, but that the accused have been released on bail and have never been tried.

10.3 Lastly, the complainant reiterates that his arrest did take place on 7 November 2010. He refers to the communication submitted on 20 February 2014 for details of the numerous allegations of torture that he has submitted to the Moroccan judicial authorities, without any of them having ever been followed up. The complainant reiterated that he had been tortured before the military investigating judge on 30 September 2011, as is evidenced by the minutes of the hearing. With regard to the place of arrest, the complainant maintains that he was arrested at the home of a friend, who confirmed the complainant's version when he was summoned to appear as a witness by the military court.

10.4 On 1 February 2016, the complainant repeated his claim that he was arbitrarily detained for 5 years and 3 months on the basis of confessions obtained as a result of torture. He believes that the State party's latest observations are a delaying tactic and do not provide substantive new information.

10.5 The complainant believes that the complaint he submitted in France with his wife does not alter the fact that the State party violated the Convention in several respects. He claims that he submitted this complaint because it was impossible for him to obtain justice in Morocco. He specifies that, under the Additional Protocol to the Convention on Mutual Assistance in Criminal Matters between France and Morocco, the French judge is under no obligation to refer the complaint to the Moroccan courts.

State party's additional observations

11.1 On 27 July 2016, the State party submitted additional observations, informing the Committee that the Court of Cassation had declared admissible, on 27 July 2016, the cassation appeal lodged by the defence team of Mr. Asfari and had decided to refer the case to the Rabat Court of Appeal (Criminal Division). The authorities reiterate, therefore, that the complainant has not exhausted domestic remedies.

11.2 In accordance with the Committee's request for details of the Court of Cassation's decision of 27 July 2016,[16] the State party communicated a copy of the decision on 20 September 2016, indicating that, pursuant to article 554 of the Code of Criminal Procedure, the Court of Appeal should uphold the judgment of the Court of Cassation on the point of law decided by the latter. The State party asserts that, by virtue of the principle of the devolutive effect of appeal, the Court will review the case in its entirety, guaranteeing the rights of the defence, through an examination of all the arguments of the parties, including the allegations of torture and ill-treatment. On 4 November 2016, the State party indicated

[16] The Committee invited the State party to: (a) provide a full copy and complete references of the Court of Cassation's decision dated 27 July 2016; (b) specify the points of law and of fact on which the Rabat Court of Appeal was to rule in the context of the referral, as well as the approximate length of time in which the case was to be reviewed; and (c) provide details of the new Code of Military Justice, which entered into force on 1 June 2015 and under which the Court of Cassation may refer a case to a civil court (the Court of Appeal) when it decides to set aside a judgment of the military court.

that the complainant's case had been entered in the register of the Court of Appeal for a hearing on 26 December 2016.

11.3 Concerning the provisions of the new Code of Military Justice, the State party states that, since its entry into force on 1 July 2015, the military court is no longer competent to try civilians prosecuted for ordinary law offences. Judgments handed down before 1 July 2015 by these courts are referred to the civil courts. With regard to decisions set aside by the Court of Cassation, the latter may, in accordance with the provisions of article 550 of the Code of Criminal Procedure, determine the court to which the case is to be referred.

Additional information from the complainant

12.1 On 13 September 2016, in response to the Committee's request for comments on the setting aside of the complainant's conviction and its referral to a civil appeals court, the complainant stated that the State party's observations provided no information on the merits of the case. He recalled that the Committee had already ruled on the admissibility of the complaint on 21 May 2015, and expressed concern that the communication from the State party had been sent at the very time that the Committee was about to rule on the merits.

12.2 The complainant recalls moreover that the State party has far exceeded the reasonable length of time for dispensing justice in his case: nearly six years have elapsed since the events in question and the submission of the first allegations of torture, repeated on several occasions, and no investigation has been initiated. The setting aside of the decision has done nothing to change that factual situation and the complainant is still being detained on the sole basis of a confession signed under duress. In his additional comments dated 13 October 2016, the complainant reiterates all aspects of his previous arguments.

12.3 On 26 October 2016, the complainant informed the Committee that his wife — Claude Mangin — had not been authorized to enter Morocco on 19 October and that she had not, therefore, been authorized to visit him in prison.

Issues and proceedings before the Committee

Consideration of the merits

13.1 In accordance with article 22 (4) of the Convention, the Committee has considered the present complaint in the light of all information made available to it by the parties concerned.

13.2 The Committee notes the complainant's allegation that the physical ill-treatment he suffered during his arrest, his interrogation at the police station and later at Laâyoune gendarmerie, and the treatment to which he was subjected during his transfer by plane in order to force him to confess, amount to acts of torture because of their severity. The Committee notes that in the course of his hearings on 12 November 2010, 12 January 2011 and 12 August 2011, the complainant complained of the treatment he had suffered, but that the investigating judge ignored his allegations and injuries and did not ask for a medical examination to be carried out. The Committee also notes the complainant's allegations that those acts of violence, which caused him acute suffering for several months, constitute a violation of article 1 of the Convention. The Committee further notes the State party's argument that, at the aforementioned hearings, neither the complainant nor his lawyer made a complaint about torture. The Committee recalls its jurisprudence according to which any person deprived of liberty must be given access to prompt and independent legal and medical assistance and must be able to contact his family in order to prevent torture.[17] Taking account of the fact that, according to the complainant, he did not have access to any of these safeguards, and in the absence of convincing information from the State party challenging these allegations, the Committee considers that the physical ill-treatment and injuries suffered by the complainant during his arrest, interrogation and detention, as presented, constitute torture within the meaning of article 1 of the Convention.

[17] General comment No. 2 (2007) on implementation of article 2 by States parties.

13.3 The Committee must also decide whether the fact that no investigation has been opened into the allegations of torture that the complainant submitted to the judicial authorities constitutes a violation by the State party of its obligations under article 12 of the Convention. The Committee takes note of the complainant's claims that, on 12 November 2010, he appeared before the military investigating judge bearing visible signs of torture such as signs of beating and blood on his face (see paragraph 3.3), but that these facts were not mentioned in the minutes; that he subsequently denounced the torture explicitly before the investigating judge on 12 January and 12 August 2011; that the same allegations were raised before the military court in the presence of the prosecutor; and that at no point did the prosecutor launch an investigation. The Committee takes note of the complainant's assertion that the cassation appeal cannot be considered an effective remedy because the Court of Cassation rules only on matters of law and on the basis of the case before it, namely the acts of which the complainant is accused. The Committee further notes the State party's arguments that the complainant did not raise the allegations of torture with the competent authorities. It notes that, on 27 July 2016, the Court of Cassation adopted a decision on the appeal filed by the complainant and his co-defendants in February 2013, referring the case to the Rabat Court of Appeal which exercises civil jurisdiction. The Committee also notes the information provided by the State party on 4 November 2016 to the effect that the complainant's case was entered in the register of the Court of Appeal for hearing on 26 December 2016. The Committee further notes that, according to information it has received, the purpose of the cassation appeal, which has now been in progress for more than three years, was to assess whether Moroccan law was applied correctly to this case and does not relate to the allegations of torture that are the subject of this complaint, which have not given rise to any investigation for nearly six years. Moreover, the information available does not make it possible to conclude that the Rabat Court of Appeal will have jurisdiction to rule on the allegations of torture made by the complainant, particularly since no instruction was given to the Court of Appeal to investigate the allegations of torture. The information presented to the Committee shows that the Court of Cassation referred the case to the Court of Appeal for the latter to give a new ruling, as the military court has not clearly demonstrated that the complainant had ordered or incited the perpetration of criminal acts by the person or persons concerned, or criminal intent on his part, elements which made the judgment subject to being declared null and void. In these circumstances, the Committee considers that it is unlikely that the Court of Appeal will be able to examine the allegations of torture.

13.4 The Committee further notes that no medical examination was requested by the military investigating judge even though the complainant bore clear signs of physical abuse, and that no investigation has been carried out in this regard. In addition, the military court did not take into account the complainant's allegations about acts of torture when deciding on his conviction, and the State party denies that such allegations were raised during the proceedings. The Committee notes also that the State party far exceeded the reasonable length of time for dispensing justice in the complainant's case: nearly six years elapsed between the events in question and the submission of the first allegations of torture, and no investigation was initiated. The cassation procedure did nothing to change this situation and the complainant is still being held in detention solely on the basis of his confession signed under duress. In the light of the above, the Committee considers that the failure to conduct any investigation into the allegations of torture made in the complainant's case is incompatible with the State party's obligations under article 12 of the Convention to ensure that the competent authorities proceed to a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed.

13.5 In the circumstances, the State party has also failed to guarantee the right of the complainant to lodge a complaint in accordance with its responsibilities under article 13 of the Convention, which presupposes that the authorities provide a satisfactory response to such a complaint by launching a prompt and impartial investigation.[18] The Committee recalls that, pursuant to article 13 of the Convention, each State party shall take steps to ensure that the complainant and witnesses are protected against any ill-treatment or

[18] See communication No. 376/2009, *Bendib v. Algeria*, decision adopted on 8 November 2013, para. 6.6. See also *Parot v. Spain*, *Abad v. Spain* and *Bouabdallah Ltaief v. Tunisia*.

intimidation that might occur as a consequence of the complaint made or any evidence given. The Committee notes that the complainant was subjected to threats following the complaint filed by the Ministry of the Interior of Morocco, and that his lawyer was arrested and expelled from Morocco in March 2016, when he was coming to represent his client in proceedings in connection with the denunciation of the acts of torture to which he was allegedly subjected. The State party has not provided any information to refute this part of the communication. The Committee concludes that these acts also constitute a violation of article 13 of the Convention.

13.6 Regarding the complainant's allegations under article 14 of the Convention, the Committee recalls that this provision recognizes the right of the victim of an act of torture to fair and adequate compensation, and requires States parties to ensure that he obtains redress for all injuries suffered. The Committee recalls that redress must cover all the harm suffered and encompass restitution, compensation and guarantees of non-repetition, taking into account the circumstances of each individual case.[19] In the present case, the Committee notes the complainant's allegation that he is suffering the physical and psychological after-effects of the ill-treatment inflicted. The Committee also notes that the fact that the military investigating judge did not order a medical examination prevented the applicant from receiving rehabilitation, compensation, support and guarantees of non-repetition of the crime. The Committee considers that the failure to conduct a thorough, prompt and impartial investigation denied the complainant any possibility of exercising his right to redress, in violation of article 14 of the Convention.[20]

13.7 The complainant also claims to be a victim of a violation of article 15 of the Convention because he was convicted on the basis of confessions obtained through torture. The Committee notes that the complainant claims to have confessed to nothing, but to have been forced to sign a document whose content he did not know.

13.8 The Committee recalls that the general nature of the provisions of article 15 of the Convention derives from the absolute nature of the prohibition of torture and therefore implies an obligation for any State party to verify that statements included in proceedings under its jurisdiction were not obtained through torture.[21] In this case, the Committee notes that, according to the complainant, the statements that he signed as a result of torture served as the grounds for the charges against him and as justification for his continued detention for more than six years; and that he has, through his counsel, questioned the probative value of the confession signed under torture at various stages of the proceedings against him, without success. The Committee also notes that the Court did not take the allegations of torture into account when sentencing the complainant on the basis of his confession and denied that these allegations had been made during the proceedings.[22] The Committee considers that the State party was under an obligation to verify the substance of the complainant's claims. By failing to carry out any verification and using such statements in the judicial proceedings against the complainant, the State party manifestly violated its obligations under article 15 of the Convention. In this connection, the Committee recalls that, in its concluding observations on the fourth periodic report of Morocco (CAT/C/MAR/CO/4, para. 17), it expressed concern about the fact that, in the State party's current system of investigation, confessions are often used as evidence for prosecutions and convictions, thus creating conditions that may provide more scope for the torture and ill-treatment of suspects.[23]

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[19] See *Bendib v. Algeria*, para. 6.7.

[20] See communication No. 514/2012, *Niyonzima v. Burundi*, decision adopted on 21 November 2014, para. 8.6.

[21] See communications No. 419/2010, *Kim v. Morocco*, decision adopted on 26 May 2011, para. 8.8, and No. 193/2001, *P.E. v. France*, decision adopted on 21 November 2002, para. 6.3.

[22] The allegations were made in the presence of witnesses and are recorded in the minutes that the complainant appended to his complaint to the Committee. However, the request for permission to question the persons who drafted the record of the interrogations about the conditions in which the confession was obtained — a request that was made by the complainant's lawyer during the hearing of 8 February 2013 before the military investigating judge — was denied.

[23] See communication No. 503/2012, *Nitakarahera v. Burundi*, decision adopted on 12 May 2014, para. 6.6. See also *Niyonzima v. Burundi*, para. 8.8.

13.9 With regard to the complaint under article 16 of the Convention, the Committee has taken note of the complainant's claim that the various forms of abuse to which he was subjected in the course of the judicial proceedings, including the deplorable sanitary conditions in which he was detained during his initial months in Salé prison in Rabat, amount to inhuman and degrading treatment. The Committee also takes note of the allegations that the complainant spent the night handcuffed to a large door with iron bars, that he was kicked and verbally abused by guards whenever he attempted to change position, and that access to a doctor, his lawyer and his wife was restricted for several weeks. The complainant also claims to have been placed in solitary confinement for four months as of 18 November 2010, to have been kept in a cell for three months, to have been denied out-of-cell exercise, and to have been unable to communicate with other detainees other than through the window. In the absence of any relevant information from the State party in this regard, the Committee concludes that the facts reveal a violation by the State party of its obligations under article 16 of the Convention.[24]

14. The Committee, acting under article 22 (7) of the Convention, decides that the facts before it reveal a violation by the State party of articles 1 and 12 to 16 of the Convention.

15. Pursuant to rule 118 (5) of its rules of procedure, the Committee urges the State party to: (a) provide the complainant with fair and adequate compensation, including the means for the fullest rehabilitation possible; (b) initiate a thorough and impartial investigation into the incidents in question, in full conformity with the guidelines of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), with a view to bringing those responsible for the victim's treatment to justice; (c) refrain from any form of pressure, intimidation or reprisals likely to harm the physical and moral integrity of the complainant and his family, which would otherwise constitute a violation of the State party's obligations under the Convention to cooperate with the Committee in good faith in the implementation of the provisions of the Convention, and to enable the complainant to receive visits from his family in prison; and (d) to inform it, within 180 days from the date of transmittal of this decision, of the steps it has taken in response to the views expressed above.

[24] See *Nyaremo v. Burundi*, para. 8.8.